Filed 4/8/09 P. v. Traister CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CARL DEAN TRAISTER,<br>Defendant and Appellant. | E043695<br>(Super.Ct.No. RIF108704)<br>**OPINION** |

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Affirmed.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr. and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Carl Dean Traister repeatedly molested his stepdaughter C.H., who suffered from cerebral palsy and had the mental capacity of an 8- or 10-year-old girl although she was in her 30's when the molestations occurred. Defendant was convicted of eight counts of oral copulation, two counts of rape, and abuse of a dependent adult. Defendant now contends:

1. The trial court erred by denying his motion for mistrial made during jury voir dire based on an excused juror's comments made in front of the jury panel.

2. He received ineffective assistance of counsel based on his counsel's failure to secure a defense witness's attendance at trial, which requires reversal of the two rape convictions.

We find that no prejudicial error occurred at trial and affirm the judgment in its entirety.

I

PROCEDURAL BACKGROUND

Defendant was found guilty of eight counts of oral copulation of a disabled person (Pen. Code, § 288a, subd. (g)),[1] two counts of rape of a mentally or developmentally disabled person (§ 261, subd. (a)(1)), and one count of inflicting pain on a dependent adult under circumstances likely to lead to great bodily injury or death (§ 368, subd. (b)(1)). Defendant was sentenced to 25 years in state prison.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

## II

## FACTUAL BACKGROUND

### A. *Prosecution*

#### 1. *C.H.'s mental capacity and defendant's sexual molestation of her*

L.T. (Mother) was C.H.'s mother. C.H. was born in February 1968. When C.H. was two years old, she drowned in a pool but survived, despite being essentially dead at the scene. C.H. was diagnosed as an athetoid quadriplegic with cerebral palsy after the accident.

C.H. could not care for herself. Mother helped C.H. shower, cooked for her, helped her get dressed, and helped her go to the bathroom. C.H. had some movement of her hands, but it was "spastic." She mostly spent her days watching television, including cartoons and Disney movies, and colored in coloring books. She had attended high school in special education classes, essentially doing work that would be done in kindergarten and first grade. She was unable to ride a bus or go anywhere by herself. Mother had never discussed sex or where babies came from with her.

Mother married defendant in 1992. Mother was the primary caretaker of C.H. until she started having to supplement their income by participating in craft fairs on the weekends. Defendant took care of C.H. while Mother was working. In the summer of 2001, Mother was gone from the house almost every weekend, and defendant was home alone with C.H.

One night in 2002, Steven Traister, defendant's stepson from a previous marriage, and his wife were visiting at defendant's house. During dinner, Mother told them that C.H. had been allowed to leave high school one day with a boy. Steven asked C.H. if she had sex with the boy. C.H. said no. Steven then asked C.H. if she had ever had sex. She looked at defendant and said yes. Defendant turned "beet red." Defendant told Mother to leave C.H. alone. After defendant left the room, C.H. told Mother that defendant had made her have sex with him and that she had not said anything because she was scared. Mother immediately called the police.

C.H. testified that when she was alone with defendant, he touched her with his finger inside and outside her vaginal area where she would go "pee." He also touched her with his "dick," which she described as what he used to go "pee." He did this two or three times. Defendant put his "dick" inside her. It hurt her.

C.H. also claimed that defendant put his "dick" in her mouth. One time she tasted "juices." His "dick" was hard at the time. It tasted "nasty." C.H. was not sure if she told defendant no, but she was afraid of him. She did not want him to do these things. C.H. bit defendant one time when he put his "dick" in her mouth. He slapped her. C.H. bit him because she did not want him doing what he was doing.

Defendant put a carrot inside her vaginal area, hurting her. C.H. did not know what sex was, where babies came from, or what a condom was. C.H. believed this happened when she was between 25 and 30 years old.

Mother talked to defendant about the accusations, and he denied that anything happened with C.H. Mother stopped having sex with defendant after he had a heart attack in 1997 or 1998. She thought that defendant could still obtain an erection. Defendant never told Mother that he could not obtain an erection.

On December 3, 2002, an examination was conducted on C.H. Her hymen had a healed tear. The tearing would have caused some pain when it occurred. It was consistent with blunt force trauma, which would include penetration.

Maria Viernes was a social worker employed by Inland Regional Center (IRC), a social service agency funded by the Department of Developmental Services that helped those suffering from mental retardation, epilepsy, autism, and cerebral palsy. Viernes helped C.H. C.H. had a diagnosis of mental retardation. She needed assistance with all of her daily living skills, including washing her hands, going to the restroom, and shampooing her hair. She had to be told two or three times how to perform simple tasks.

C.H. was considered a developmentally delayed adult with cerebral palsy and some spasticity. Based on tests given to C.H. in 1994, when she was approximately 26 years old, she was assessed somewhere between mild mental retardation and normal intelligence. C.H.'s mental age was determined to be between 8 and 10 years. As for her capability for independent living, she was the age equivalent of a five year old. An eight or nine year old would not be expected to be able to consent to a sexual act.

2. *Defendant's statement to police*

Riverside County Sheriff's Detective Cherie Blossfield interviewed defendant on December 17, 2002. Defendant admitted he had rubbed his penis against C.H.'s vagina but denied that he had put it inside her. Defendant claimed that C.H. got up on the bed and started to give him that "tongue thing," which he described as flicking her tongue in and out of her mouth, essentially coming on to him. Defendant claimed that she started to give him "suggestive action" and he "tried it," but it didn't work. Defendant was unable to obtain an erection and stopped. Defendant admitted he tried this several times during the prior year.

Defendant claimed C.H. was learning about sex from somewhere. Mother had caught C.H. masturbating two or three times and "raised holy hell." Defendant complained that Mother was not interested in having sex with him. Defendant and Mother had not had sex for eight years. The last time they tried to have sex he was only "half erect," so he gave up.

Defendant admitted in the interview that he touched C.H.'s vaginal area with his finger, but not inside. Defendant admitted putting his penis in C.H.'s mouth at least six times, but no more than 12. Defendant attempted to have sexual intercourse with C.H., but he was unable to. He placed his flaccid penis against her vaginal area "[i]n great hope that it would get a little." These events all occurred during the prior two years.

3. *Evidence Code section 1108 evidence*

J.T. was defendant's stepdaughter from a previous marriage. When J.T. was 11 years old, defendant put his finger in her vagina while they were alone in his truck. Defendant repeated this for several years while he lived with J.T.'s family. When J.T. was 16 years old, defendant promised her a car if she would have sex with him.

L.J. was J.T.'s sister. When she was 10 years old, defendant had touched her one time inside her vagina with his finger. When L.J. told defendant not to do it, he told her it would feel good. Defendant also tried to French kiss her several times, but she stopped him.

Defendant had been married to M.T.'s grandmother, and M.T. had lived with them for a time when she was three and eight years old. When M.T. was three years old, defendant put his penis in her mouth. When M.T. was eight years old, defendant put his mouth on her vagina. He also rubbed his penis on her vagina. Defendant instructed M.T.'s uncle, who was only 15 or 16 years old, to do the same thing to her, and the uncle also did it. Defendant never put his penis inside her vagina. On another occasion, defendant made M.T. masturbate him until he ejaculated. M.T. was scared of defendant because he would sometimes be violent.

B. *Defense*

Defendant testified on his own behalf. He tried to have sexual intercourse with C.H. but was unsuccessful because he could not obtain an erection. He also put his hand on C.H.'s vagina. Defendant had been unable to obtain an erection since 1996. His

medical conditions of diabetes, high blood pressure, and a heart condition caused his erectile dysfunction. Defendant was advised by his personal physician that he had very low levels of testosterone. Defendant was not sure if he was taking any medication to increase his testosterone levels.

C.H. initiated sex with defendant by flicking her tongue at him and putting her finger in her mouth. Defendant had caught C.H. masturbating and had told Mother . C.H. penetrated herself with a carrot. Defendant admitted that C.H. orally copulated him at least six to eight times but said that she wanted to do it. Defendant never achieved an erection when she orally copulated him, and he never ejaculated. C.H. never bit him.

Defendant slapped C.H. one time because she had pinched him very hard. Defendant denied he ever inappropriately touched J.T., L.J., or M.T. Defendant denied he ever promised J.T. a car if she had sex with him.

Defendant claimed that C.H. "[came] on to [him]" for four or five months until he "succumbed" to the pressure. Defendant stated, "I did it to help her satisfy herself I guess." Defendant claimed it made C.H. happy to do these things with him. He asserted she was crying on the witness stand because she was confused by the prosecutor's questions.

## III

## DENIAL OF MISTRIAL MOTION DURING VOIR DIRE

Defendant contends the trial court erred by refusing to grant his motion for mistrial brought during voir dire based on comments made by an excused juror that he

contends tainted the entire jury panel. Defendant claims he was denied his right to a fair and unbiased jury.

A. *Additional Factual Background*

The trial court informed the jurors that the instant case involved the sexual molestation of C.H. and that she suffered from cerebral palsy and was wheelchair bound. Prospective Juror Dr. R. (R.), who was a family practitioner and geriatrician, stated that she worked with both juvenile and adult patients. R. indicated that while she was doing her geriatrics fellowship she had contact with one patient who had cerebral palsy and was in a nursing home. The patient was molested by the janitor in the nursing home. Another patient had dementia and was molested by a friend. R. stated: "I mean I have a bias in this case just because I think these people— patients with cerebral palsy, or dementia they're not able to defend themselves mentally or physically. I have a hard time." The trial court responded: "And I understand that, and you're right. It's just like oftentimes young children, they really can't defend themselves either. Do you think your experiences dealing with these types of cases with these individuals might have an effect upon your ability to be a fair juror?" R. responded: "I think it would. I'm just being honest." R. was then immediately excused.

At the lunch break, defendant brought a motion for mistrial based on the comments made by R. Defendant contended that R.'s statement that persons with cerebral palsy were defenseless tainted the jury even though she did not refer to the victim or defendant in this case. Defendant contended that this amounted to expert

testimony. The prosecutor responded that these comments were not evidence in the case and the jurors would be so instructed.

The trial court did not believe that anything said by R. was beyond common sense. The trial court stated to both counsel: "Yes, she did say that individuals that are suffering from cerebral palsy—I think she did say they are defenseless. But that's a truism. Once the jury sees the victim in this case testify, I think it's very possible they may come to that same conclusion and in a sense these people, because of their mental affliction, are defenseless with respect to anything in life." The trial court found that the statements did not taint the jury requiring that the entire panel be disqualified. Each counsel would be given 30 minutes to question the jurors. The trial court would allow defendant to renew the request for a mistrial if further voir dire revealed that the jury had been tainted by R.'s statements.

Defendant's counsel asked the panel if anyone had a relative or friend who suffered from cerebral palsy. One juror responded that a neighbor had cerebral palsy but it would not make him or her more sympathetic in this case. Another juror had a niece with cerebral palsy but said she could be fair. Another juror did not think C.H.'s condition would be a factor in deciding the case. Defendant's counsel finally asked: "Is there anyone else in here that would have some problem being fair and neutral as we start out once you see [C.H.]'s condition or thinks they're going to have some difficulty being fair?" No one responded.

One of the jurors asked if they would see C.H. The prosecutor responded that the jurors could not be biased based on the appearance of the witnesses. None of the jurors stated that they would vote for defendant's guilt merely out of sympathy for how C.H. looked. The prosecutor admonished the jurors that they could not have sympathy for either the victim or the defendant.

Later, defendant's counsel asked the entire panel if they felt that someone who has cerebral palsy cannot have sexual desires. Several jurors responded that they did not know enough about cerebral palsy to answer the question. Another juror indicated she knew some kids when she was in high school who had cerebral palsy, and it seemed it was just enough effort for them to get through the day. One juror had a friend in college who had cerebral palsy, and it was frustrating to listen to the person. Defendant never renewed his mistrial motion.

The jurors were admonished prior to trial with Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 104 that "[a]s trial jurors you must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom. 'Evidence' is the sworn testimony of witnesses and any exhibits admitted into evidence and anything else I tell you to consider as evidence."

B. *Analysis*

Defendant here sought a motion for mistrial and dismissal of the jury panel. "A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged"'" [citation], that is, if it is 'apprised of

prejudice that it judges incurable by admonition or instruction' [citation]. . . ." (*People v. Avila* (2006) 38 Cal.4th 491, 573.) The question of whether a potential juror has tainted the jury pool, requiring a mistrial, is a matter of discretion for the trial court. The court's decision is given great deference. (*People v. Medina* (1990) 51 Cal.3d 870, 889; see also *People v. Thornton* (2007) 41 Cal.4th 391, 414 [the trial court is in the best position to assess the demeanor of the venire and the individuals themselves]; *People v. Martinez* (1991) 228 Cal.App.3d 1456, 1466-1467.)

"[D]ischarging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*People v. Medina, supra,* 51 Cal.3d at p. 889.)

Here, R. made a brief comment that it was her own belief that persons with cerebral palsy were defenseless. The trial court responded that children were also unable to defend themselves. R. was immediately removed from the panel when she stated that she did not think she could be fair. After her removal, the other jurors were asked if they felt that the fact the victim in the case had cerebral palsy would impact their verdict. There were no affirmative responses. We cannot find based on this isolated remark that the jury panel was tainted by the comment. All of the jurors responded that they would not let C.H.'s cerebral palsy impact their verdict. To the extent defendant claims this was improper expert evidence, R.'s comments were based on her own feelings, not those of a doctor who specialized in taking care of persons suffering from cerebral palsy.

Furthermore, the jury was instructed that the only evidence they could rely on was sworn testimony and exhibits. We must assume the jury followed the instructions and relied only on the sworn testimony presented in court, not a brief comment by a juror who was excused from the panel. (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) The trial court did not abuse its discretion by denying defendant's mistrial motion, and there is nothing before us to show that the jury was biased against him.

Defendant's reliance on *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630[2] to support his contention is misplaced. In *Mach*, the defendant was charged with sexual conduct with a minor. (*Id*. at p. 631.) A prospective juror, who was a child protective services social worker, stated in front of the jury panel on at least four occasions that she had never had a case in which a child had lied about being sexually assaulted. (*Id*. at p. 632.) The court found the statements tainted the prospective jurors due to the nature of the statements, the certainty and authority with which they were made, and the number of times they were repeated. (*Id*. at pp. 633-634.)

In the instant case, R. was not an expert in the field of mental retardation or cerebral palsy. Defendant contends that R. was a trained medical doctor whose expertise was treating people with conditions similar to C.H. However, R. indicated that she worked mostly with elderly patients, whom she treated in their homes. In fact, she stated that she had experience with mentally and developmentally disabled patients while doing

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[2] While federal cases may be relied upon, they are not controlling authority on matters of California law. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

a fellowship. R. also stated that it was her own belief that the persons suffering from cerebral palsy were unable to defend themselves, not based on any training as a doctor. Furthermore, this was a brief comment by R., not four separate statements as in *Mach*.

Although defendant faults the trial court for compounding the error, he stated in his reply brief that he was not arguing judicial misconduct. The trial court's response, which essentially agreed with the comments by R. and referred to children not being able to defend themselves, did not so bias the jury as to require the granting of the mistrial. The trial court did not need to immediately admonish the jury that they should disregard this "expert" testimony, as it did not qualify as such. Additionally, the jury was instructed by the trial court, "It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be." Again, we must presume the jurors followed the instructions. (*People v. Smithey*, *supra*, 20 Cal.4th at p. 961.)

We conclude that the trial court did not abuse its discretion by denying defendant's motion for mistrial.

IV

INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends he received prejudicial ineffective assistance of counsel due to his counsel's, Keith Vickers, failure to properly subpoena defense witness Dr. Kenneth Browning, who did not appear at trial. Defendant claims that had Dr. Browning testified, the jury would have found him not guilty on the two rape counts.

A. *Additional Factual Background*

Prior to trial, Vickers made an offer of proof for Dr. Browning's testimony. Vickers explained, "Well his testimony will be to the fact—the state at the time, the state of [defendant]'s health at that time. Due to his health conditions and the medication he was on, he was unable to obtain an erection and most likely suffered from erectile disfunction [*sic*]."

On Tuesday, May 8, 2007, in the middle of the prosecution's case-in-chief, Vickers informed the trial court that he had subpoenaed Dr. Browning for that Thursday. Dr. Browning had advised Vickers that his wife was having surgery on that day. Vickers told Dr. Browning that he could be called out of order on Wednesday, but Dr. Browning was busy on that day helping his wife prepare for surgery. Defendant's counsel suggested to the trial court that Dr. Browning could appear the following Monday, but the trial court indicated the case had to be done and argued that day. The trial court felt that Dr. Browning could arrange his schedule to be present sometime on that Wednesday or Thursday. Vickers advised the trial court he had informed Dr. Browning he would have to be present one of those two days.

Vickers informed the trial court later that day that he had left a message at Dr. Browning's office but had not heard back. Vickers left a message that he wanted him to testify on Thursday morning.

After the prosecution rested on Wednesday, the jury was excused until Thursday morning, and all of the jurors indicated they would be available to deliberate on Friday.

The trial court then asked counsel regarding Dr. Browning testifying. It stated on the record that Vickers had informed it that Dr. Browning had been personally served with a subpoena for Thursday morning. The trial court admonished Vickers that Dr. Browning would have to testify the following day or not at all.

That afternoon, while discussing jury instructions, Vickers informed the trial court he had gone to Dr. Browning's office during the lunch hour and parked outside. Vickers saw people coming in and out of the office. Vickers then called the office and stated he saw people coming in and out of the office and wondered why Dr. Browning was not returning his calls. Vickers advised the trial court that he did not go in the office because he did not want to be accused of stalking the doctor. The trial court instructed Vickers to go to the office and tell Dr. Browning he had to be in court the following day.

Dr. Browning did not appear in court on Thursday morning. Dr. Browning's receptionist informed Vickers that morning that he was helping his wife, who was in surgery, and would not be available that day. Vickers had called Dr. Browning's office on Wednesday seven times and had not received a return telephone call. The court had not received a call on the subpoena. The trial court then reviewed a proof of service and declaration from Vickers that showed Dr. Browning had been personally served on May 7 at 1:15 p.m. to appear in court on Thursday morning at 9:00 a.m. The trial court believed Dr. Browning was trying to avoid testifying.

Defendant's counsel had another witness to call and asked that they "wait a day or so" to see if he could get Dr. Browning to appear. The trial court did not see any reason

for continuing the case, because short of a sheriff's escort, it appeared Dr. Browning would not voluntarily appear. Even if the court continued the case, it was unclear whether he would show up. The trial court indicated that the jury was time qualified until the following Monday or Tuesday but that they needed time to deliberate, and there was only one alternate.

Defendant's counsel then stated another offer of proof for Dr. Browning's testimony: "The purpose for Dr. Browning to testify is a very vital issue for the defense regarding the defense that [defendant] is putting on that he was impotent during this period of time and this is in regards to a blood test that Dr. Browning has results for that show [defendant] has a testosterone level of 114 when normal range for a man to obtain an erection is somewhere between 240 and 1,000." Defendant's counsel argued it was grounds for reversal if the testimony was excluded.

The trial court did not believe the evidence was grounds for reversal because defendant had testified to the information. The trial court did not want Dr. Browning to hold the court and the jury "captive." It denied Vickers's request for a continuance. Despite that, the trial court issued a warrant for Dr. Browning based on his failure to appear pursuant to the "personally served subpena" and on Vickers's personal declaration.

On May 15, the following Monday, Dr. Browning appeared in court on the warrant with counsel. The prosecutor and Vickers were not present. Dr. Browning claimed he was never personally served with the subpoena but, rather, it was left with his

receptionist at his office. Dr. Browning also claimed that the telephone numbers that appeared on the subpoena were not for Vickers's office, and the cellular telephone number given "wasn't operative."

Dr. Browning's counsel indicated that Vickers brought the subpoena into Dr. Browning's office, dropped it on the counter, informed the staff the subpoena was for Dr. Browning, and then walked out. As Vickers was leaving, Dr. Browning and the receptionist went outside to talk to him. The bench warrant was recalled, and Dr. Browning and his counsel were ordered to return to court on June 8.

At that hearing, the trial court specifically asked Vickers if he had personally served Dr. Browning and Vickers finally admitted he had left the subpoena on the receptionist's desk. Vickers did discuss the subpoena with Dr. Browning as he was walking out to his car.

The trial court responded: "Well, that's not what you represented to the Court. I specifically asked you if you personally served Dr. Browning, and you indicated that you had." The trial court apologized to Dr. Browning for the issuance of the warrant.

Defendant's counsel brought a written motion for new trial on the ground the trial court erred by refusing to continue the case to allow Dr. Browning to appear and testify. Defendant claimed that his right to present the defense of impotence was foreclosed by Dr. Browning's absence. The trial court denied the motion for new trial, finding that Dr. Browning had not been personally served with the subpoena; further, defendant had testified regarding his medical condition, and although Dr. Browning's testimony would

have corroborated defendant's testimony, the trial court did not believe defendant was deprived of the opportunity to present his defense.

B. *Analysis*

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 104 S.Ct. 2052] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Here, Vickers did appear to believe that he had properly served Dr. Browning because Dr. Browning actually received the subpoena. However, numerous cases have held that a witness in a proceeding must be personally served. (*In re Abrams* (1980) 108 Cal.App.3d 685, 694 [service on counsel not personal service on witness]; *Sternbeck v. Buck* (1957) 148 Cal.App.2d 829, 833 [service made within 100 feet of the person to be served, on his wife, who accepted for him, was found invalid because not a personal delivery].) Section 1328, subdivision (a), provides that service of a subpoena "is made by delivering a copy of the subpoena to the witness personally." (See also Code Civ. Proc., § 1987, subd. (a).) Although there are exceptions to this rule, none of them appear to apply here.

Regardless of whether counsel properly served the subpoena, the trial court refused to grant a continuance to secure Dr. Browning's attendance due to what the trial court deemed to be Dr. Browning's deliberate attempt to avoid testifying at trial. Even had the subpoena been properly served, the trial court did not issue the bench warrant until after it refused to continue the case. Counsel could not be deficient if, even had he

properly served the subpoena, the trial court refused to allow time for Dr. Browning to be ordered to court. Although there could be an argument that the trial court erred by refusing to grant a continuance, that issue is not raised by defendant on appeal, even though it was the subject of his new trial motion.

Regardless, in deciding whether there was ineffective assistance of counsel or whether the trial court erroneously denied defendant's request for a continuance, we must decide whether the omission of Dr. Browning's testimony was prejudicial. To establish an ineffective assistance claim on appeal, a defendant must show that his counsel's deficient performance was prejudicial. (*Strickland, supra*, 466 U.S. at p. 688.) "To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1147.) Similarly, a defendant must demonstrate that he was prejudiced by the denial of a motion for continuance. (*People v. Zapien* (1993) 4 Cal.4th 929, 972.)

Here, we have the two vague offers of proof from counsel as to the purported testimony of Dr. Browning. According to counsel, Dr. Browning would have testified that defendant had a testosterone level of 114 and that a man must have a level of between 240 and 1,000 in order to obtain an erection. There was no indication as to when the tests were performed or if defendant was taking any medication to raise his testosterone levels. We have no declaration from Dr. Browning or the blood test results.

In light of this purported testimony, as we discuss, *post,* we cannot say that based on the overwhelming evidence presented at trial of defendant's guilt that the jury would have found him not guilty of rape.

There was testimony from C.H. that defendant's penis was hard one time during oral copulation but not when he penetrated her. "Any sexual penetration, however slight, is sufficient to complete the crime." (§ 263.) Proof of "prolonged or deep insertion, or emission or orgasm, is unnecessary." (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) "'[P]enetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina.'" (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366.) The "'penetration which is required is sexual penetration and not vaginal penetration.'" (*Ibid.*)

Here, the jury was instructed with CALCRIM No. 1004, that "[s]exual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required." The jury could have believed that defendant tried to get erect by inserting his penis in C.H.'s vagina, but eventually gave up. Defendant himself told Detective Blossfield that he tried to have sexual intercourse with her but it did not work. Even if defendant was unable to obtain an erection, if he was able to make any penetration of C.H., this was sufficient to support rape.

The jury could also conclude, based on the injuries to C.H., that defendant in fact had been able to obtain an erection with her. C.H. had a tear in her hymen consistent

with blunt force trauma caused by penetration. Nothing in the offer of proof by counsel shows that defendant could never achieve an erection. Further, the fact that C.H. testified that defendant had ejaculated was proof that he was able to achieve an erection. The jury could reasonably conclude, based on the physical evidence, that defendant was in fact able to obtain an erection.

Based on the evidence discussed, *ante*, in addition to defendant's incredible story that C.H. was the initiator of sex between them and the evidence that he had molested three of his other stepdaughters, it is inconceivable that, had Dr. Browning testified, the result would have been different. We reject that defendant was prejudiced by the omission of Dr. Browning's testimony.

V

DISPOSITION

We affirm the judgment in its entirety.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.